Supreme Court, U. S.
FILED
JAN 9 1979
K, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,
Petitioners,
v.
ARIZONA BOARD OF REGENTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 5, 1979

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QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE ARIZONA COURTS TO FOLLOW THE COMMON-LAW MAXIM DENYING AN UNINCORPORATED ASSOCIATION THE CAPACITY TO SUE CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

II. WHETHER THE DECISION OF THE ARIZONA COURTS CONFLICTS WITH ANY CIRCUIT COURT DECISIONS.

III. WHETHER THE REGENTS' EXERCISE OF SUPERVISION CONSTITUTES AN UNLAWFUL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE LOWER COURT'S INTERPRETATION OF THE CONTRACT IS CLEARLY WRONG.

STATEMENT OF THE CASE

The following statement of the case is intended to be a supplement to the statement of the case previously submitted by Petitioner in this matter.

The principal dispute between the parties in this matter arises over the interpretation of conflicting clauses of the "Agreement for Sale of Cooperative Bookstore to the Associated Students". (See copy of contract attached in Petitioner's Appendix at *A-18.*) In that agreement it is provided that ". . . all collections, disbursements, and accounts will be kept by the Business Office of the University." Further, "The Board of Regents reserves the right to supervise, approve, or disapprove any policies in connection with the operation of the Cooperative Bookstore." At the same time as stated in the Agreement, the Associated Students agreed to pay approximately $22,000 for ". . . the management and operation of the Cooperative Bookstore . . .".

In its opinion the Arizona Court of Appeals determined that the Agreement for Sale referenced above was ambiguous, and that it did not, when considered as a whole, clearly and unambiguously set forth the rights of the parties. The Court further held that the agreement was not so worded that it could be given a certain or definite legal meaning or interpretation and that the Court could not ascertain by examining its provisions whether a transfer of bookstore management and operation to Associated Students of the University of Arizona also included an unrestricted transfer of the right to and control of bookstore profits. The Court went on to say that once a contract is determined to be ambiguous, extrinsic evidence may

be resorted to for the purpose of ascertaining its real meaning. The Court of Appeals then said that a determination of the surrounding facts, consideration of which is necessary to resolve ambiguities, is for the trier of fact and that where evidence is conflicting a reviewing court will not substitute its opinion for that of the trial court. The court then concluded that based upon the record there was reasonable evidence to support the trial court's determination that over the years the Board of Regents had consistently maintained supervision and ultimate control over bookstore operations, including disbursal of profits. The 1937 agreement thus conveyed only a limited property right to ASUA. It provided a source of funds, but subject to the Board of Regents' control, and found no deprivation of property without due process of law.

ARGUMENT

I

WHETHER THE DECISION OF THE ARIZONA COURTS TO FOLLOW THE COMMON-LAW MAXIM DENYING AN UNINCORPORATED ASSOCIATION THE CAPACITY TO SUE CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

Petitioner Associated Students of the University of Arizona ("ASUA") first argues that the Arizona courts' decision to follow the common-law maxim and deny unincorporated associations the capacity to sue con-

flicts with an important constitutional policy articulated by this Court in *NAACP v. Button*, 371 U.S. 415 (1963) and *United Transportation Union v. State Board of Michigan*, 401 U.S. 576 (1971).

This Court has long recognized the common law which prohibits an unincorporated association, unless authorized by statute, from suing as a juridical entity. *Moffat Tunnel League v. United States*, 289 U.S. 113 (1933).

Assuming *arguendo* that unincorporated associations are entitled by the Constitution to sue as a group, Rule 23.2 of the Arizona Rules of Civil Procedure allows class actions to be brought by or against one or more members of an incorporated association as representative parties on behalf of all members of the association. In the instant case the option to sue as a class under Rule 23.2 was clearly available to ASUA; however, this course of action was not chosen.

Petitioner also contends that the decision of the Arizona courts denies ASUA equal protection of the law and cites the case entitled *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972) for support. Respondent submits that the case cited stands only for the proposition that government may not grant the use of a forum to people whose views it finds acceptable and deny use to those persons wishing to express less favorable or more controversial views. It is clear from the record that the Arizona courts' decision denying unincorporated associations the right to sue did not consider whether or not ASUA was attempting to litigate a controversial issue. The purpose for the rule that an unincorporated association cannot sue is to protect the unincorporated association and its mem-

bers. If an unincorporated association could sue, then it could be sued and the association and its individual members could be responsible for the tortious or contractual obligations of the association. This would be disastrous to ASUA as every University of Arizona student is *without choice* a member of the association, according to the current ASUA Constitution, Article 2. Only students may be members, but all students are required to belong to ASUA. Thus, ASUA's members would presumably be personally liable for claims against the association. The undesirability of this result demonstrates the wisdom of the common-law rule against suits by unincorporated associations.

II

WHETHER THE DECISION OF THE ARIZONA COURTS CONFLICTS WITH ANY CIRCUIT COURT DECISIONS.

Each case cited by Petitioner in support of his contention that the decision of the Arizona courts conflicts with several circuit court decisions is distinguishable. There is simply no conflict. The circuit court decisions are all based on Rule 17(b) of the Federal Rules of Civil Procedure. That rule provides as follows:

> (b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except* (1) *that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States,* and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a). (Emphasis added.)

The instant case was filed in state court, not federal court; the State of Arizona has not adopted Federal Rule 17(b). Absent such a rule, it is clear that the decisions Petitioner claims conflict with the Arizona courts' decisions are simply inapplicable.

III

WHETHER THE REGENTS' EXERCISE OF SUPERVISION CONSTITUTES AN UNLAWFUL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE LOWER COURT'S INTERPRETATION OF THE CONTRACT IS CLEARLY WRONG.

Although believing the 1937 Agreement's language to be unambiguous, the Board of Regents introduced evidence in the lower court properly concerning the construction given to the contract by ASUA and the Board of Regents as demonstrated by subsequent acts of the parties since the 1937 Agreement was executed. It is clear from the judgment entered in the lower court that this evidence was taken into consideration by the court in determining that under the terms of the 1937 Agreement, the Arizona Board of Regents of the University of Arizona has the right to maintain and exercise supervision over all funds produced through the operation of the bookstores at the Univer-

sity of Arizona. It is, of course, an elemental principle of the law of contracts that a court may consider the parties' subsequent acts as evidence of their intention at the time of contracting. *See, Crone v. Amado,* 69 Ariz. 389, 397, 214 P.2d 518, 524 (1950); *Rio Grande Oil v. Upton Oil Co.,* 33 Ariz. 474, 266 P. 3 (1928); *Corbin on Contracts,* § 558 (1960). *Pendelton v. Brown,* 26 Ariz. 604, 625, 321 P. 213 (1923), stated:

> It is elementary that courts will adopt a construction given to a contract by the parties themselves, unless such construction does violence to the express terms of the writing. *This rule is especially applicable where such interpretation has extended over a long period of time.* (Emphasis added.)

A further statement of the law applicable to this case was made by the Ninth Circuit in *Brown v. Cowden Livestock Co.,* 187 F.2d 1015, 1019 (9th Cir., 1951), applying Arizona law:

> The acts of parties under a contract, *before disputes arise,* are the best evidence of the meaning of doubtful contractual terms ... (Emphasis added.)

Applying the above law, the lower court examined the parties' past practices and concluded that based upon the past practices of the parties, the University of Arizona Board of Regents, under the 1937 Agreement, was entitled to exercise control over the expenditure of the profits of the ASUA Bookstore. The evidence demonstrating Regent management and

control of Bookstore affairs is recorded as early as 1939 and extended over a period of 30 years. It is a part of the record in this case and need not be reiterated here.

When it is necessary for the trier of fact to resort to an examination of extrinsic facts in order to interpret a contract, those findings should not be disturbed on appeal. *Holaway v. Realty Associates,* 90 Ariz. 289, 292, 367 P.2d 643, 646 (1962).

The decision of the Arizona courts held that the contract *was* ambiguous and concluded as follows:

> We have reviewed the record and there was reasonable evidence to support the trial court's determination that over the years the Board of Regents had consistently maintained supervision and ultimate control over bookstore operations, including disbursal of profits. The 1937 Agreement thus conveyed only a limited property right to ASUA. It provided a source of funds, but subject to the Board of Regents' control. *We find no deprivation of property without due process of law.* (Emphasis added.)

CONCLUSION

There can be no question that the decisions of this Court with respect to the right of groups to associate to assert a legal right does not represent a policy that would overrule this Court's decision in *Moffat Tunnel League v. United States,* 289 U.S. 113 (1933) which denies unincorporated associations the capacity to sue absent statutory authorization.

The common-law maxim adopted as the law in Arizona also does not violate the equal protection clause of the Fourteenth Amendment. There is certainly a rational basis for distinguishing between groups abiding by the laws on incorporation and groups without legal status under state law in determining whether or not ASUA has the capacity to sue in the State of Arizona.

The circuit court decisions allowing student groups to bring suit against the governing bodies of their respective schools are clearly based upon Rule 17(b) of the Federal Rules of Civil Procedure and that rule has not been adopted in Arizona. Clearly, the United States Constitution does not require that Rule 17(b) be adopted by the State of Arizona.

Finally, the Arizona court's decision that the contract in question was ambiguous and its determination that the trial court's findings of fact were reasonable should be left undisturbed by this Court.

For all of the above reasons, Respondent submits that a writ of certiorari should not issue to review the judgment and opinion of the Arizona Court of Appeals, Division Two.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1979, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to William Joseph Risner, 100 North Stone Avenue, 910 Pioneer Plaza, Tucson, Arizona 85701,

counsel for Petitioners. I further certify that all parties required to be served have been served.

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